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**FILED**

8-08-16

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Investigation into the State of Competition Among Telecommunications Providers in California, and to Consider and Resolve Questions raised in the Limited Rehearing of Decision 08-09-042.

Investigation 15-11-007  
(Filed November 5, 2015)

**ADMINISTRATIVE LAW JUDGE RULING GRANTING IN PART AND  
DENYING IN PART MOTION TO STRIKE**

On July 29, 2016, The Communications Industry Coalition (Coalition), a group consisting of Consolidated Communications of California Company (U1015C), Consolidated Communications Enterprise Services, fka Surewest Televideo (U7251C) and Citizens Telecommunications Company of California (U1024C), Frontier California Inc. (U1002C), Frontier Communications of America, Inc. (U5429C), Frontier Communications of the Southwest, Inc. (U1026C), T-Mobile West LLC (U3056C) dba T-Mobile, Comcast Phone of California, LLC (U5698C), California Cable and Telecommunications Association, Charter Fiberlink CA-CCO, LLC, Time Warner Cable Information Services (California) LLC (U6874C), Cox California TelCom LLC (U5684C), AT&T California (U1001C) and New Cingular Wireless PCS, LLC (U3060C) filed a motion to strike from the record of this proceeding in its entirety the previously-admitted testimony of witnesses representing the Office of Ratepayer Advocates (ORA), The Utility Reform Network (TURN), The Greenlining Institute (Greenlining), the Center for Accessible Technology (CforAT), Sprint Telephony PCS, LP (Sprint), the California Association of Competitive Telephone Companies (CALTEL) and Writers Guild of America-West, Inc. (Writers Guild).

The specific testimony that is the subject of the Coalition motion is that of ORA witnesses Selwyn, Gallardo, Clark and Tully; TURN witnesses Roycroft and Baldwin; CforAT witnesses Belser and Woodford; and witnesses Goodman (Greenlining), Burt (Sprint), DeYoung (CALTEL) and Blum-Smith (Writers Guild). For reasons set out below, subject to the exceptions noted in Ordering Paragraph 3 relating to the testimony of Dr. Lee Selwyn, the motion to strike is denied.

The basic argument put forward in the Coalition motion is that the Commission, by not permitting cross-examination of the witnesses identified above, has deprived the Coalition members of their due process right to an evidentiary hearing that includes cross-examination. The Coalition motion argues that the July 20, 2016 hearing at which panels of experts discussed among themselves and with the presiding officers various issues in this investigation was an inadequate response to their due process concerns.

The Coalition motion rests on a fundamentally erroneous interpretation of Public Utilities Code Section 1708. In the July 1, 2016 Scoping Memo, we rejected the claim that Section 1708 requires an evidentiary hearing in this proceeding. As we said there:

The Commission has repeatedly rejected the notion, advanced at the PHC, that the Commission is required to hold a hearing. *See, e.g.,* D.15-11-046 (In re Procurement Policies) (“We reject this argument [that a hearing is required] because no statute, rule, regulation or decision requires the Commission to hold evidentiary hearings. . . .”

We have repeatedly stated that this docket is a data gathering and data analysis exercise designed to obtain a snapshot of telecommunications in California today, not to set (or repeal) rules and that no rules or regulations will be adopted (or repealed) in this phase of this proceeding. Accordingly, Section 1708 does not

require us to hold an evidentiary hearing and the due process rights of the Coalition members have not been violated by admitting into evidence the pre-filed testimony of the witnesses identified above.

The Coalition motion advances alternate reasons for rejecting some or all of the identified testimony, arguing in the alternative that such testimony is either outside the scope of the proceeding or that the testifying witness is not qualified as an expert. As to the former point, we believe that all the testimony is within the scope of the proceeding broadly construed and that Coalition objections to specific testimony are more properly addressed to its weight than to its admissibility. As to the qualifications of various witnesses, we note that such objections could have been made much earlier in the proceeding and that, in any case, accumulated subject matter expertise, which the challenged witnesses possess, is typically regarded as a basis for qualifying a witness even if that witness lacks an academic degree in the subject matter about which he is testifying. Once again, objections to the witnesses' qualifications might more properly be addressed to the weight of their testimony rather than to their credentials.

Additionally, we overrule the Coalition's objections to our announced intent to take official notice of the reports in Appendix A of the OII, as well as those listed in the Scoping Memo. While we agree with the Coalition that some of those reports are more "advocacy" in tone than others, this objection goes to the weight we will assign to those reports.

There are two exceptions to our denial of the Coalition's Motion.

On August 3, 2016, the United States District Court for the Northern District of California entered an Order Granting Motion to Enforce or Clarify Injunction in *New Cingular Wireless PCS LLC et al vs. Michael Picker et al.* Case

*No. 16-cv-03461-VC*, clarifying the Court's earlier grant of plaintiffs' motion for a preliminary injunction. Under the terms of the clarified Order, the Commission may not allow anyone other than a direct employee to possess the data that are the subject of the injunction and any such data supplied to a person who is other than a direct employee must be retrieved. ORA's expert Selwyn, who is not a direct employee of the Commission, received prior to the date of the original May 20, 2016 Order Granting Motion for Preliminary Injunction, certain data that are covered by the injunction. The District Court clarified that the Preliminary Injunction applies to Dr. Selwyn's possession of the data. In compliance with the District Court's order, he is returning those data to the Commission.

The May 20 and August 3, 2016 Orders explicitly do not contest the Commission's ability to use the granular, disaggregated (carrier-specific) subscription data in question. Nor does that granular data appear in Dr. Selwyn's testimony. Statewide totals of that subscription data do appear in Table 13 of Dr. Selwyn's confidential "Commission Only" testimony. Although the Commission can – under both California law and the Court's May 20 and August 3, 2016 Orders – use the underlying data, and although statewide subscription numbers appear in the public record and are submitted in ARMIS reports as generically "confidential,"<sup>1</sup> the status of Dr. Selwyn's analysis of that subscription data remains unclear pending final resolution of the federal court litigation. Therefore, the motion to strike is granted as to the columns in Table 13 of Dr. Selwyn's testimony that report (on a statewide basis) the results of his analysis of the subscription data - "Provider 25/3 subscribers" and "Subscription

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<sup>1</sup> See April 1, 2016 Ruling at 10 and footnote 18; *see also* CPUC 2014 Service Quality Report, Appendix A, at <http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M111/K579/111579788.PDF>.

HHI" – and the Commission will not rely on that analysis in conducting its review of the state of competition in the California telecommunications market without a further court order permitting it to do so.

The Coalition also raises the propriety of ORA's Network Outage Reporting System (NORS) data, in its confidential testimony, although that data was produced in an earlier proceeding pursuant to a nondisclosure agreement (NDA) with an effective date of September 23, 2013. The Coalition has not produced the NDA, it does not appear on the docket sheet for the earlier proceeding (A-14-04-013), and ORA denies that its witness in this case signed the NDA. Based on our understanding that ORA itself does not sign NDAs (although its outside consultants such as Dr. Selwyn might do so), we see nothing in Public Utilities Code section 583 that would prevent ORA from using that material in a confidential filing in this proceeding. We have dispensed in this case with the requirement that parties must file motions for leave to file confidential testimony under seal; all confidential testimony admitted into the record is considered under seal, subject to further ruling by the assigned Commissioner or the Commission.

**IT IS RULED that:**

1. Subject to the exception contained in Ordering Paragraph 3 hereof, the motion of the Communications Industry Coalition to strike some or all of the previously admitted testimony of Office of Ratepayer Advocates' witnesses Selwyn, Gallardo, Clark and Tully; The Utility Reform Network witnesses Roycroft and Baldwin; Center for Accessible Technology witnesses Belser and Woodford; and witnesses Goodman (The Greenlining Institute), Burt (Sprint Telephony PCS, LP), DeYoung (Competitive Telephone Companies) and Blum-Smith (Writers Guild of America-West, Inc.) is denied.

2. The objections of the Communications Industry Coalition to official notice of the reports in Appendix A and those listed in the Scoping Memo are overruled.

3. The motion of the Communications Industry Coalition to strike the previously admitted testimony of Selwyn is granted as to the columns "Provider 25/3 subscribers" and "Subscription HHI" in Table 13 of Selwyn's June 1, 2016 testimony.

4. The motion of the Communications Industry Coalition (Coalition) to strike the portion of Office of Ratepayer Advocates' (ORA) testimony relating to confidential Network Outage Reporting System (NORS) reporting is denied for the reasons stated above, without prejudice to its renewal if the Coalition can show that an ORA employee signed a nondisclosure agreement prohibiting the use of NORS data in subsequent proceedings.

Dated August 8, 2016, at San Francisco, California.

/s/ KARL J. BEMESDERFER

Karl J. Bemesderfer  
Administrative Law Judge